EXPLANATORY MEMORANDUM TO THE

COURT OF PROTECTION (AMENDMENT RULES) 2005
2005 No. 667

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs. It is laid before Parliament by command of her Majesty.

2. Description

2.1. These rules make various amendments to the Court of Protection Rules 2001. The instrument increases existing fees in line with cost inflation in the court and the Public Guardianship Office (PGO) and introduces new fees to cover work that is not included in the current fee structure. It also amends the structure of transaction fees payable in certain 'special cases' where the court approves or authorises a transaction on behalf of a client. The instrument additionally amends the process for serving notice of proceedings on clients in cases where the court appoints an interim receiver where it is necessary to make immediate provision to manage and protect the client's property and affairs.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1. None

4. Legislative Background

4.1. These rules are made by the Lord Chancellor, in exercise of the powers conferred upon him by sections 106 and 108 of the Mental Health Act 1983, and with the consent of the Treasury as required by section 106(5) of that Act.

5. Extent

5.1. This instrument applies to England and Wales only.

6. European Convention on Human Rights

6.1. The Instrument changes the rules relating to serving notice of an application on clients to enable the court to dispense with service where it considers it necessary to appoint an interim receiver in cases of emergency. This will allow the court to take immediate action to protect a client's financial affairs, where serving notice would cause harmful delay, for example where there is evidence of financial abuse, or where it is likely that the client's estate would suffer loss. The amendment seeks to achieve a balance between the rights under article 6 of the Convention, and the avoidance of harm. The PGO sought advice from Counsel on this point who advised that personal service would not be necessary in an urgent case.

7. Policy Background

7.1. This Statutory Instrument is the result of the fourth of a series of reviews of

Court of Protection fees by the PGO Fee Strategy Working Group. The court's fee structure was criticised by the National Audit Office in 1999 because the fees were based on the income of the client, rather than the service received, and certain categories of clients subsidised services received by others. The Department undertook to the Public Accounts Committee that they would bring the cross-subsidy to an end.

7.2. Under Treasury guidelines, the Court of Protection and the PGO, the agency that carries out the court's administrative functions, must meet their running costs through fees paid by clients, and such fees must reflect the cost of providing the service. The purpose of reviewing fees is to achieve optimum cost recovery through a fair and transparent fee structure, where clients pay for the services they receive, avoiding cross subsidy.

7.3. The PGO consulted with its key stakeholders, through its stakeholder group, the Consultative Forum. The membership of the Consultative Forum includes representatives from the not-for-profit sector, such as the Alzheimer's Society and MIND; the Law Society; and local authorities who provide a receivership service. The PGO held meetings with stakeholders and took account of their views before seeking Ministerial approval to the fee changes.

7.4. The PGO's Consultative Forum understand the need for the business to recover its full cost and accepted the need to change fees to move towards meeting this need together with the introduction of new charges for work that is not covered in the current fee structure. They are supportive of the fee remissions policy, which ensures that the PGO's most vulnerable clients with little means are protected where payment would otherwise cause hardship.

New Fees

7.5. ***Administration fee (rule 78):*** Rule 78 is amended to introduce a new administration fee payable when the court makes a short order to manage a small estate with a capital value of less than £16,000. Although most short orders are "one off" orders, for a minority the court considers it is desirable to retain on going supervision and monitoring of the case. This fee is to cover the administrative work connected with these cases.

7.6. ***Approval of estate account:*** Where a client becomes entitled as the residuary beneficiary or life tenant under a will or intestacy, specialist court staff check that the estate has been properly administered and that the client has received their proper entitlement under the will or intestacy. This process is an important protection for the PGO's vulnerable clients.

7.7. ***Direction to manage and let property transaction fee:*** In some cases the court will authorise the receiver to manage and let a client's property instead of authorising its sale. This has become increasingly popular over the past few years with the proliferation of the buy to let market as clients and their families opt to preserve the capital value of property for future generations while still producing an income for the present.

7.8. ***Supplementary Winding Up fee:*** In most cases where the client dies, their

personal representative will obtain a grant and apply for final directions within 6 months. However, in some cases the administration of the estate is not so straightforward and the court becomes involved in tracing personal representatives and relatives. The new fee will cover cases where the administration of the estate takes more than 12 months and will be payable on the anniversary of the client's death.

Changes to existing fees

7.9. In most cases fees have been uprated in line with cost inflation, that is the increase in the running costs of the court and the PGO. However, in order to recover cost accurately and to ensure the fee structure is fair, some fees have been changed substantially. Details of these changes are below:

7.10. ***Receivership administration fee:*** This fee is payable where an officer of the court is appointed a receiver of last resort. This fee has increased above cost inflation from £3,500 to £4,500. The reason for this is that the PGO is in the process of transferring its last resort cases to private receiverships and the increase reflects the diminishing workload against the cost of providing the service.

7.11. ***Transaction fee:*** The transaction fee payable where the court approves a gift or other form of settlement on behalf of a client is changed to a fixed fee from a percentage one. In addition it is amended to introduce a new fee to cover the cost of hearings to decide applications. The changes will ensure these fees, including the one for the hearing, reflect the cost of the service and avoid cross subsidy between clients.

7.12. The court has issued guidance on fee remissions to ensure that any client who will suffer hardship from payment of fees will not usually have to pay or will pay a reduced fee. Additionally any client whose assets are below £12,250 which is currently the capital limit at which someone would qualify for the full rate of Income Support or Local Authority funding for residential care will automatically have their fees waived.

7.13. A copy of the remission guidelines are attached for the committee's attention.

8. Impact

8.1. The impact of these changes will be that fees payable in Court of Protection proceedings will change from 1 April 2005.

9. Contact

9.1. Any enquiries regarding the proposed legislation should be addressed to:

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